



IN THE SUPREME COURT OF NAURU

[MISCELLANEOUS CAUSE]

Case No 74 of 2015

BETWEEN Hon. SPRENT DABWIDO MP & Hon. SQUIRE JEREMIAH MP
APPLICANTS

And THE REPUBLIC **RESPONDENT**

Before: Madraiwiwi CJ

For the Applicants: In person
For the Respondent: L Sovau

Date of Hearing: 10 July 2015
Date of Ruling: 17 July 2015

CATCHWORDS:

Application for Bail – prosecution opposed on grounds of public interest and safety – whether change in circumstances – applicants’ conduct – Case Stated on constitutional issues – Bail granted

RULING

1. Hon Sprent Dabwido and Hon Squire Jeremiah (the ‘applicants’) made a fresh application for bail on Friday 10 July while also appearing before this Court on a Case Stated for the opinion of this Court by the learned Resident Magistrate on certain constitutional issues they raised before her. Those matters were mentioned on 13 July 2015 and have been adjourned to 17

August 2015 to allow the applicants, together with Hon Mathew Batsiua, to engage alternative legal representation.

2. On 18 June 2015, the applicants were charged with:
 - i) Being in a security restricted area contrary to section 107 (2) of the Civil Aviation Act 2011;
 - ii) Unlawful Assembly contrary to section 62 of the Criminal Code 1899;
 - iii) Riot Contrary to section 63 of the Criminal Code 1899; and
 - iv) Disturbing the Legislature contrary to section 56 of the Criminal Code 1899.

All these charges concern the incidents that occurred on 16 June 2015 in the precincts of Parliament and the adjacent runway. A warrant for the arrest of the two applicants was issued and executed the same day. They were subsequently arrested and detained in police custody.

3. The two applicants were brought before the District Court on 19 June 2015 and their counsel Mr Clodumar sought bail while the prosecution applied to have them remanded in custody.
4. In a comprehensive written ruling delivered on 23 June 2015, the learned Resident Magistrate denied the applicants bail and the matter was adjourned to 2 July 2015 at 10am for mention before the District Court.
5. On 2 July 2015, the applicants were unable to further their application for bail not merely because they were unrepresented, but more the unfortunate result of their lack of familiarity with the procedures and process involved. However, they did make an application for a Case Stated referred to in paragraph 1 which relates to:
 - (a) Whether or not they have the right to counsel of their own choice pursuant to Article 10 (3) (e) of the Constitution; and
 - (b) Whether or not the circumstances surrounding their arrest, detention and charges preferred against them are unconstitutional.The learned Resident Magistrate then adjourned both applications (i.e Case Stated and a fresh bail request) before this Court on 10 July 2015.
6. In both the decision of 23 June 2015 and an earlier one handed down on 18 June 2015 in relation to Hon Batsiua, the learned Resident Magistrate discussed the principles relating to the grant of bail. While there is no specific legislation in Nauru relating to the issue, bail is dealt with in statute.
7. The position in relation to bail in Nauru was described by Eames CJ in *Atto V Director of Public Prosecutions*¹ as follows:

“4. The applicant applies for bail. Section 80 of the Criminal Procedure Act 1972 provides that a person may apply for and be granted bail “other than a person accused of murder and treason”. This constitutes a presumption against bail in a case of murder charge, which was the common law position: see Re Anderson [1978] VR 322 AT 324 PER O’Bryan J; R v Martin (1980) 23 SASR 233 AT 235-6 PER Leggoe J. By section 8 (3) a judge may grant bail, even on a charge of murder, but with a presumption against bail, the applicant must show exceptional circumstances justifying bail.

5. The principles governing an application for bail on a murder charge set out in The Queen v Henry Gwao, a decision of Chetwynd J in the High Court of the Solomon

¹ [2011] NRSC 16 (19 July 2011)

Islands on 15 February 2011. The legislation in Solomon Islands regarding bail is in identical terms to that in Nauru.” (emphasis added)

8. The presumption in cases other than murder must therefore be in favour of the granting of bail, unless the prosecution can point to an exception or reason why bail should be refused.
9. Counsel for the prosecution cited three grounds for the continued remand of the applicants. The first was that the strength of the case against them was compelling. The two applicants were the alleged ringleaders of the protests which took place on 16 June 2015. Third, the public interest and safety and security concerns called for the applicants’ continued remand.
10. Hon Dabwido on behalf of the two defendants read out to the Court a list of grounds for the grant of bail which are set out for completeness:
 - a. They were not represented on the last occasion;
 - b. They did not have their lawyer of choice;
 - c. They were seeking a stay;
 - d. Hon Dabwido has no previous convictions;
 - e. The charges were flawed;
 - f. The evidence was weak;
 - g. They were not the purported offenders;
 - h. There were no victims;
 - i. The police have not completed their investigations;
 - j. The case concerns constitutional issues and may not be heard for some time;
 - k. They had family obligations to fulfil;
 - l. Concern about losing employment;
 - m. Willingness to meet all reasonable costs of bail;
 - n. No risk of absconding.
11. It is the prosecution’s case that circumstances have not changed since the refusal by the learned Resident Magistrate of bail on 23 June 2015 in which she concluded thus after assessing the evidence placed before her:

“21. This is where the case of these two defendants deviates from and must be distinguished from the case of Mr Mathew Batsiua. I am not satisfied that there will not be another protest and if repeated, it will be peaceful. Their conduct in organising another protest turned violent, shows on the face of it, a willingness to disregard the process for obtaining permits to conduct a lawful protest. And if repeated, it is clear from the evidence of the police, and there is (sic) only 89 Police Officers, and that they would not be able to contain. It is also clear from the evidence that some civilians have had to assist police because police were outnumbered. Ordinary Civilians should not be put in a situation where they will have to assist the police and further retaliate if they are injured.

22. I am therefore satisfied that the Prosecution has discharged the onus to satisfy me that there is a reasonable suspicion that the two defendants have committed offences and that bail should be refused in the Public Interest. Bail is refused. Defendants remanded to 2nd July 2015.”

12. In *Bartlett v Regina*² His Lordship Kabui J (as he then was) observed as follows about the nature of bail:

“Any bail application is about the freedom from detention. Freedom from detention is a constitutional right that being a freedom of personal liberty. It is a right that can

² [2006] SBHC 4; HSCI-CRC 022 OF 2006 (17February 2006)

however be denied by the courts in certain circumstances. The circumstances are as set out in section 5 (1) of the Constitution. The right to freedom is therefore not an absolute right. It is a right that is qualified by exceptions. Any application for bail is a relief that is available only to accused persons who have been remanded in custody by the courts and are awaiting trial. The granting or otherwise of that relief depends upon the discretion of the court based upon the evidence presented before it."³

13. Given the similarity of Articles 5 and 10 of the Constitutions of Nauru and the Solomon Islands, the observations made by Palmer CJ in *Kwaiga v Reginam*⁴ are also apposite as regards the matter of bail:

"The rights to bail emanate from the right to secure protection of the law, that where a person has been charged with a criminal offence, he shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law-section 10 (1) of the Constitution. That same section provides in paragraph 10 (2) (a) that such person shall be innocent until he is proven or has pleaded guilty. That presumption of innocence correlates to the presumption of liberty enshrined in section 5 (1) of the same Constitution that a person's liberty may only be removed save for the various circumstances set out in that section. That presumption tilts in favour of an accused who had been charged with an offence by way of a prima facie right to bail-see section 5 (3)(b) of the Constitution and section 106 of the Criminal Procedure Code ("CPC"); see also the case of Rv Perfili."

14. In the light of the learned Resident Magistrate's finding that the prosecution had discharged the onus of a reasonable suspicion that the two defendants had committed the offences and bail be refused in the public interest, the Court will review the personal circumstances of the defendants having particular reference to section 80 (1), (2) and (3) of the Criminal Procedure Code 1976. They provide:

"(1) Subject to the provisions of section 21 of this Act, where any person, other than a person accused of murder or treason, is arrested or detained in custody without a warrant by a police officer or attends or is brought before the District Court and is prepared at any time whilst in the custody of the police officer or at any stage of the proceedings before the court to give bail, he may in the discretion of the police officer or the court be admitted to bail with or without a surety or sureties.

(2) The amount of bail shall be fixed with due regard to the circumstances of the case.

(3) Notwithstanding anything contained in subsection (1) of this section, a judge of the Supreme Court may in any case direct that any person be admitted to bail with or without sureties or that bail required by the District Court or a police officer as to sureties be varied."

Subsection (3) confers on the Court a wide latitude in terms of the grant of bail which is before it presently as a fresh application. However it must be exercised in accordance with applicable principles regard to, context and balancing competing interests.

15. In this regard, the Court respectfully adopts the approach taken by Palmer CJ in *Kwaiga's* case where his Lordship stated:

"In considering bail, the court is involved in a risk assessment. This entails assessing how much risk society should bear on one hand by granting bail and how much the

³ Ibid, at page 1

⁴ [2004] SBHC 93; HC-CR 333 of 2004 (9August 2004) at page 1

accused should bear on the other by being remanded in custody or on conditional bail. If the risks are high such that society should not be exposed to that risk, then bail normally would be refused and the accused made to bear that risk by having his presumption of innocence and liberty curtailed even in the absence of a lawful conviction in a court of law.

*This risk assessment however is not as easy as it sounds because it entails a prediction of future behaviour, requiring the balancing of and measurement of what the defendant is likely to do in the future; which cannot be a 100% accurate. Further much of that prediction is measured by what had happened in the past, which can be quite unreliable and prejudicial against the accused. In many instances as well, much of what is relied on by the prosecution is based on his interpretation of what the police had said had happened. **It is important therefore that the courts do not lose sight of the purpose and requirements of bail and what it entails. It is not what the police says which dictates whether bail should or should not be granted. It is the balancing of the risk assessment by the Court after hearing both sides which determines at the end of the day which way the discretion of the court will fall.***⁵
(emphasis added)

Have the circumstances of the applicants altered to their advantage since the ruling of the learned Resident Magistrate?

16. The Court notes that the record of proceedings of the District Court of 4 July 2015 reveal that the applicants were released from custody, without objection from the prosecution, to attend the funeral of their late niece under escort. They were returned to custody without incident at 8pm the same evening.⁶ There is no suggestion they contravened the order of the District Court while at liberty during that period.
17. A further perusal of the record of proceedings of the District Court dated 6 July 2015 clearly show the applicants were released from custody to attend the customary feast following the funeral of their late niece. They were returned to custody at 10pm the same evening again without incident.⁷
18. In revisiting the prosecution's objections to bail, the Court finds that its earlier consent tacit or otherwise, to the release of the applicants on 4 and 6 July 2015 respectively, together with the unblemished conduct of the applicants on those occasions, has tilted the balance in their favour. The prosecution may not raise the issue of the public interest and safety concerns now when it omitted to do so in those previous instances. Neither may it cite the events of 16 June 2015 when the defendants have behaved appropriately on the most two recent occasions of their subsequent release. Put simply, the prosecution cannot in all consistency continue to insist on the applicants' remaining in remand while allowing them a measure of freedom to attend to family and personal matters. It is as Palmer CJ has observed a matter of balancing the risks and making a determination.
19. Moreover, the applicants are also challenging the constitutionality of the charges preferred against them and their subsequent arrest and detention following the charges. Their right to a legal counsel of their choice is a live issue before this Court and has already been adjourned for mention to 17 August 2015 as stated earlier.

⁵ Ibid at page 2

⁶ R v Squire Jeremiah and Sprent Dabwido District Criminal Court Criminal Case No 22 of 2015 Ruling 23 June 2015 4 July 2015

⁷ R v Squire Jeremiah and Sprent Dabwido District Court Criminal Case No. 22 of 2015, record of proceedings 6 July 2015

20. These issues by definition will need to be determined prior to the criminal charges being heard. This conclusion follows from the nature of the constitutional questions formulated in the Case Stated which relate to the right of the applicants to legal counsel of their choice and the validity of the circumstances relating to their arrest and detention as well as the charges preferred against them. The implications for the applicants' respective parliamentary careers in the event of an adverse outcome emphasises the gravity of what is at stake for them. The resolution of these issues necessarily entail further delays with the very real prospect of them being held in remand without let in the interim. That is not a satisfactory state of affairs given there have as yet been no full disclosures and investigations are still continuing.
21. Accordingly, the Court is respectfully of opinion that there has been a change in circumstances since 23 June 2015 that justifies the exercise of its discretion to direct that bail be granted pursuant to section 80 (3) of the Criminal Procedure Act 1976. Bail is therefore granted to the defendants subject to the following conditions:
- a. Surrender their passports forthwith to the Court;
 - b. Not to leave the country without the permission of the Court;
 - c. Not to apply for another passport without the permission of the Court;
 - d. To reside at their present abodes of residence;
 - e. To keep the peace and be of good behaviour whilst on bail;
 - f. Not to enter the precincts of Parliament without the permission or invitation of the Speaker of Parliament;
 - g. To provide two sureties each to the satisfaction of the Court;
 - h. Report once a week to the Nauru Police Force on Fridays before 5pm with effect from Friday, 24 July 2015;
 - i. To remain at their respective residences between the hours of 6 o'clock in the evening to 6 o'clock in the morning except in cases of an emergency where they may be required to attend hospital;
 - j. To appear in Court as and when required including any application for variation of the foregoing.

DATED this 17th day of July 2015

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Joni Madraiwiwi
CHIEF JUSTICE